Filed 3/24/09 Uranga v. Continental Casualty Co. CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MATTSON URANGA, Plaintiff and Appellant, v. CONTINENTAL CASUALTY CO., Defendant and Respondent.	2d Civil No. B205995 (Super. Ct. No. SC047425) (Ventura County)

An insurer (respondent) provided automobile coverage for appellant's employer, National Ready Mix. Appellant was injured in an automobile collision while acting within the course and scope of his employment. The parties disputed the amount of coverage owed and the matter proceeded to binding arbitration. Appellant was awarded $799,034.49. After the award was rendered, appellant agreed to waive postjudgment interest and dismissed his petition to confirm the arbitration award. Respondent paid the award within 30 days.

One year later, appellant filed an action against respondent for breach of the implied covenant of good faith and fair dealing, alleging that he was coerced into the settlement and respondent acted in bad faith in the processing of his claim. Respondent moved for summary judgment, which the trial court granted. On appeal, appellant contends that he raised a triable issue of fact that respondent acted in bad faith. He also

appeals a postjudgment order on a motion to tax costs. We affirm the grant of summary judgment but reverse the order denying the motion to tax costs.

FACTS AND PROCEDURAL HISTORY

Appellant's employer, National Ready Mix, had two insurance policies; one for commercial automobile coverage and another for workers' compensation benefits. CNA, through respondent Continental Casualty Company, provided uninsured and underinsured motorist benefits. That policy (BUA 1996005796) provided first-party coverage to an employee injured by an uninsured or underinsured motorist.

On April 10, 2001, appellant was acting within the course and scope of his employment while driving a vehicle owned by National Ready Mix. He was rear-ended by an underinsured motorist (UIM) and allegedly suffered personal injury. Appellant has a history of back problems and had undergone spinal surgery in 1995 and 1998. Following the collision, he underwent surgery twice more, in 2001 and 2002.

Appellant filed a claim against the driver who caused the collision and a claim for workers' compensation benefits. He resolved his claim against the driver for her policy limits of $75,000. Appellant's workers' compensation claim against National Ready Mix was resolved by stipulation on November 30, 2004, in the amount of $168,687.93.

Following resolution of the foregoing claims, appellant pursued a UIM claim under his employer's policy. Under the "limitations of coverage," the UIM policy provided that an insured would not be entitled to duplicate payments for the same loss. This included loss under "any workers' compensation, disability benefits or similar law." The parties agreed to participate in binding arbitration, pursuant to the terms of the policy and Insurance Code section 11580.2. They selected as the arbitrator Retired Justice Robert Feinerman.

On March 24, 2005, appellant made a Code of Civil Procedure section 998 offer to compromise of $799,034.49. On May 4, respondent offered to settle appellant's UIM claim for $250,000. The CNA claims adjuster then learned of the Subsequent

Injury Fund (SIF),[1] which could potentially pay significant future benefits to appellant. This changed respondent's assessment of the settlement value of the case. On May 26, respondent withdrew the $250,000 offer and extended a $50,000 offer.

On June 29, 2005, respondent brought a motion before the arbitrator seeking an order entitling it to take any offset against SIF benefits paid to appellant. The motion was denied. On July 14, respondent brought another motion before the arbitrator, seeking a continuance of the arbitration so that it might file a declaratory relief action concerning any offset against future SIF benefits. The motion to continue the arbitration was denied. On July 15, respondent filed its complaint for declaratory relief.

On July 26 and 27, 2005, the matter was arbitrated and, on August 2, the arbitrator issued an award in favor of appellant in the amount of $551,312.07. He valued appellant's claim at $795,000, offset by $75,000 paid by the insurance company for the driver who caused the collision and by the $168,687.93 workers' compensation award. The arbitrator specified that each party was to bear its own costs.

On August 3, 2005, respondent offered to settle the claim for $200,000[2] in an attempt to resolve the SIF issue by compromise. On August 12, appellant filed a petition to confirm the award. Appellant agreed to relinquish his claim to post-award interest and, on August 29, respondent paid the $551,312.07 award. On September 1, appellant filed a notice of settlement and later dismissed with prejudice his petition to confirm the award. Respondent then dismissed its declaratory relief action.

Complaint

One year later, on August 8, 2006, appellant filed an action for damages against respondent for breach of the implied covenant of good faith and fair dealing. Appellant alleged that respondent did not fairly and reasonably investigate his claim for

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[1] The SIF fund is related to workers' compensation. It is a mechanism by which an injured worker can be compensated for aggravation of an existing injury. (See Lab. Code, §§ 4751 & 4753.)

[2] This figure is also referred to in the record as $250,000.

UIM benefits and made "lowball" offers. He contended that respondent deliberately delayed the payment of benefits to coerce him into accepting a lesser sum than the arbitration award.

As a result of respondent's actions, appellant asserted that he incurred additional and unnecessary expenses, including attorney's fees and costs; relinquished his entitlement to "several days" of interest on the unpaid arbitration award; and suffered emotional distress. He requested compensatory and punitive damages.

Motion for Summary Judgment

Respondent answered and moved for summary judgment. It argued that there existed no triable issue of material fact because (1) appellant had been paid all contractual indemnity owed and thus could not maintain an action for breach of the implied covenant of good faith and fair dealing; (2) respondent was entitled to submit the issue of its liability to arbitration and could not be exposed to tort damages as a result; and (3) it had not delayed the payment of benefits because there existed a "genuine dispute" over the amount of indemnity due appellant.

The trial court granted summary judgment in favor of respondent on the ground that respondent met its burden by introducing evidence that it paid all the contractual indemnity owed. The burden shifted to appellant, who failed to raise a triable issue of fact as to the payment of indemnity. The court found that appellant could not maintain a bad faith claim because he lacked the prerequisite that policy benefits had been wrongfully withheld. It concluded that appellant abandoned his claim for post-award interest and waived his right to attorney's fees when he dismissed the petition to confirm the arbitration award.

DISCUSSION

Standard of Review - Motion for Summary Judgment

Summary judgment is properly granted where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) We review orders granting or denying a summary judgment motion de novo. (*Archdale*

v. American Intern. Specialty Lines Ins. Co. (2007) 154 Cal.App.4th 449, 462; *Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 601.)

Implied Covenant of Good Faith and Fair Dealing

It is a fundamental principle that a covenant of good faith and fair dealing is implied in every insurance contract - that neither party will do anything to injure the other's right to receive benefits under the agreement. (*Gruenberg v. Aetna Ins. Co*. (1973) 9 Cal.3d 566, 573.) An insurer who unreasonably and in bad faith withholds payment of a claim is subject to tort liability. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720.)

Where benefits are due an insured, "'delayed payment based on inadequate or tardy investigations, oppressive conduct by claims adjusters seeking to reduce the amounts legitimately payable and numerous other tactics may breach the implied covenant because' they frustrate the insured's right to receive the benefits of the contract in 'prompt compensation for losses.' [Citation.]" (*Waller v. Truck Ins. Exchange* (1995) 11 Cal.4th 1, 36.) A delay in payment of benefits due under an insurance policy gives rise to tort liability only if the insured can establish the delay was unreasonable. (*Wilson, supra,* 42 Cal.4th at p. 723; *Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208, 214-215.)

Any breach of the implied covenant of good faith and fair dealing necessarily requires an underlying failure to pay policy benefits. Appellant did not establish that respondent failed to pay benefits due under the policy or that it caused an unreasonable delay. To the contrary, respondent paid the full amount of the arbitration award within 30 days after it was rendered. Appellant's waiver of his right to post-award interest and the dismissal of his petition to confirm the arbitration award waived his bad faith claim and his entitlement to attorney's fees and costs. Under the summary judgment statute, the burden shifted to appellant to show that a triable issue of material fact remained in dispute. (Code Civ. Pro., § 437c, subd. (o)(2).) He did not meet this burden.

Appellant argues extensively concerning the propriety of respondent's conduct in pursuing an SIF offset. We remind appellant that respondent's motions to

request a determination of its entitlement to SIF credits were denied and respondent dismissed its declaratory relief action concerning the same matter. The issue of SIF credits was not litigated or adjudicated, thus it is not properly before us.

Appellant has also alleged that respondent engaged in "expert shopping" and "report shopping" and manufactured false evidence to suggest that he was not injured in the collision. It is unnecessary to address his contention. Because appellant was paid the contractual indemnity owed, there is no basis for him to challenge the opinions of respondent's experts.

Order Denying Motion to Tax Costs

Appellant appeals the trial court's postjudgment order denying his motion to tax costs. During discovery, appellant answered respondent's interrogatories by asserting the attorney-client privilege. Respondent filed a motion for summary judgment, which it later took off calendar. The trial court determined that the $200 filing fee for the summary judgment motion was a recoverable cost. We disagree. The trial court's ruling was an abuse of discretion because the motion was withdrawn. (*Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 Cal.App.4th 592, 605 [motion to tax costs reviewed for abuse of discretion]; *Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 774 [same].)

Appellant also moved to tax costs in the amount of $11,466.73 for expert fees. This represented 37.9 hours of time expended by Bernard Feldman, respondent's claims handling expert. Appellant contended that the costs were unreasonable because Feldman was never deposed and did not testify.

The trial court denied the motion to tax costs. It reasoned that Feldman's declaration was vague as to dates, but reflected his review of a 2,700-page claim file and established his billing rate and fees. However, the trial court abused its discretion in denying appellant's motion to tax these fees. (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262 [award of expert fees subject to abuse of discretion standard].) Notwithstanding the strengths or weaknesses of Feldman's declaration, the motion for

which the declaration was prepared had been withdrawn. There was no judgment upon which to attach an award of costs.

We affirm the order granting summary judgment. The postjudgment order denying appellant's motion to tax costs is reversed. Each party to bear its own costs on appeal.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Thomas Hutchins, Judge

Barbara Lane, Judge

Superior Court County of Ventura

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